

# A Misguided Debate About Affirmative Action?

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*Justice O'Connor and her colleagues' expectation that racial preferences in education will not be necessary in twenty-five years ignores over four decades of accumulated data from national databases that demonstrate that students from underrepresented groups consistently perform poorly in major academic disciplines. This expectation also ignores more recent research indicating that gaps in knowledge and skills between underrepresented students and many of their European American and Asian American peers surface before kindergarten and continue through higher education and professional schools. For those minority students who do make it into selective colleges and universities, research shows that they consistently underperform despite entering with high standardized test scores and strong high school grade point averages. This is referred to as the "overprediction phenomenon," where measures of past performance predict higher future performance by underrepresented students than is actually achieved. Although the overprediction research is strongest at the undergraduate level in higher education, it exists on the K-12 level and at the graduate/professional school level as well.*

*Some of the explanations of this phenomenon are explored in a brief history of affirmative action in education, which concludes with a discussion of Grutter v. Bollinger. Despite the ruling in Grutter, the author cautions that the debate over affirmative action is partially based on ideology and dogma rather than on the evidence that, as a nation, we have not been effective in figuring out how to increase the talent pool. Our challenge lies not in rationalizing the use of alternative admissions criteria but in actually conceptualizing what needs to be done, for whom, and under what conditions. This is where the debate becomes meaningful.*

## I. INTRODUCTION

Speculation as to how to construe Justice O'Connor and her colleagues' expectation that "25 years from now, the use of racial preferences will no

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longer be necessary”<sup>1</sup> to ensure diversity, has surfaced since the United States Supreme Court’s ruling in *Grutter v. Bollinger* in June 2003. Those opposed to affirmative action regard this expectation as a mandate while others view it as the Court’s hope that underachieving groups will have made sufficient progress to nullify the use of race-conscious policies to ensure diversity. Some believe that affirmative action does not have a place forever in the United States, but that it is rather a temporary solution to correct the inequities in access and participation in education and other domains. What is contributing to the debate is the difficulty we have of deciding when enough is enough. Justice O’Connor and her colleagues’ expectation may mark the beginning of a compromise. Despite the elegance of this argument, we may be forcing the issue at this point. That is, we may not be ready to debate whether affirmative action policies continue to be necessary; certainly not when a review of the achievement data for the four decades after the Civil Rights Act of 1964<sup>2</sup> suggest that African American, Latino, and Native American students at all socioeconomic status (SES) levels are not only underrepresented with respect to high academic achievement among the nation’s top college students, but also underrepresented among high achievers throughout all levels of the educational system.<sup>3</sup> What are some of the reasons for this phenomenon?

## II. UNDERREPRESENTATION AND OVERPREDICTION

The political aspect of this question, particularly the interaction between race, ethnicity, and socioeconomic status, partially explains the tolerable degrees to which this question is actually asked and how it is answered. The current momentum and interest to not only answer certain elements of this question, but to also address them, stem partially from: (1) research findings from forty years ago concerning the importance of family background in academic achievement;<sup>4</sup> (2) a discussion of the poor performance of American students in comparison to their international peers;<sup>5</sup> (3) the need to

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<sup>1</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>2</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241–68 (1964).

<sup>3</sup> THE COLLEGE BOARD, *REACHING THE TOP* 8–9 (1999); L. SCOTT MILLER, AN AMERICAN IMPERATIVE: ACCELERATING MINORITY EDUCATIONAL ADVANCEMENT 10–11 (1995); L. Scott Miller & Eugene E. Garcia, *Better Informing Efforts to Increase Latino Student Success in Higher Education*, 36 EDUC. & URB. SOC’Y 189, 190–94 (2004).

<sup>4</sup> JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* 298–302 (1966).

<sup>5</sup> THE NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, *A NATION AT RISK* 8 (1983).

give greater attention to minority students in urban schools;<sup>6</sup> and (4) solid research concerning the wide discrepancies in majority and minority education, possible underlying causes, and thoughtful recommendations for a long-term national effort to improve the economic, institutional, cultural, and social factors that impact whether and how minority students excel.<sup>7</sup>

As a result of this and more recent research, we now know that gaps in knowledge and skills between the referenced ethnic minority groups and their European American and Asian American peers surface before kindergarten and continue throughout the elementary and secondary school years.<sup>8</sup> These gaps, however, are not only prevalent within school but also out of school and between schools.<sup>9</sup> Some of the consequences of these gaps are further reflected in the pronounced minority underrepresentation among high achievers in selective colleges, universities, and professional schools,<sup>10</sup> and the overrepresentation of African Americans in special education and Latinos in English language learning programs,<sup>11</sup> for example.

As indicated, the serious underrepresentation of students of color among those who perform in the top quartile has received relatively little attention in elementary, secondary, or post-secondary education. Current attention is primarily focused on the overrepresentation of students of color on the left

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<sup>6</sup> TASK FORCE ON EDUCATION FOR ECONOMIC GROWTH, EDUCATION COMMISSION OF THE STATES, ACTION FOR EXCELLENCE 40–41 (1983).

<sup>7</sup> MILLER, *supra* note 3, at 337–76.

<sup>8</sup> Sean F. Reardon, *Sources of Educational Inequality: The Growth of Racial/Ethnic and Socioeconomic Test Score Gaps in Kindergarten and First Grade* 17 (Population Res. Inst. Paper No. 03-05R, 2003); MILLER, *supra* note 3, at 10–11; Miller & Garcia, *supra* note 3, at 190–92; JERRY WEST ET AL., NATIONAL CENTER FOR EDUCATIONAL STATISTICS, AMERICA'S KINDERGARTNERS 15–16 (2000); JERRY WEST ET AL., THE KINDERGARTEN YEAR, at xi (2001).

<sup>9</sup> HOWARD T. EVERSON & ROGER E. MILLSAP, EVERYONE GAINS: EXTRACURRICULAR ACTIVITIES IN HIGH SCHOOL AND HIGHER SAT SCORES 6 (2005); Reardon, *supra* note 8, at 20.

<sup>10</sup> WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 74–78 (1998); Miller & Garcia, *supra* note 3, at 192–94; Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 427 (2004).

<sup>11</sup> See COMMITTEE ON MINORITY REPRESENTATION IN SPECIAL EDUCATION, NATIONAL RESEARCH COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 1–2, 35–90 (M. Suzanne Donovan & Christopher T. Cross eds., 2002); THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, RACIAL INEQUITY IN SPECIAL EDUCATION (Daniel J. Losen & Gary Orfield eds., 2002); CATHERINE E. SNOW & GINA BIANCAROSA, ADOLESCENT LITERACY AND THE ACHIEVEMENT GAP: WHAT DO WE KNOW AND WHERE DO WE GO FROM HERE? 1–4 (2003).

end of the academic achievement distribution to the neglect of problems that a limited pool of high achieving students encounter on the right end. These problems include an increasing gap in scores between high achieving minority and majority students on the post-secondary level and the overprediction of traditional indicators such as high standardized test scores and strong high school grade point averages (GPAs). That is, students from underrepresented groups have lower GPAs in college than would be predicted by their college admission test scores and high school GPAs. This pattern is often referred to as the “overprediction phenomenon,” where measures of past performance predict higher future performance by underrepresented students than is actually achieved.<sup>12</sup>

The problem of overprediction surfaced in the 1980s,<sup>13</sup> 1990s,<sup>14</sup> and the early 2000s.<sup>15</sup> Although the overprediction research is strongest at the undergraduate level in higher education, it exists on the K-12 level and at the graduate/professional school level as well. Current research on the undergraduate level suggests that the overprediction phenomenon exists for a wide range of preparation levels and majors, but may be largest in the quantitative majors and possibly for the best prepared students by traditional measures. Specifically, Leonard Ramist and colleagues suggest that the overprediction phenomenon is particularly acute in minority students’ freshman year and in gateway courses in the sciences, engineering, mathematics, and other technical disciplines.<sup>16</sup> This research also seems to implicate a wide range of historically white institutions.<sup>17</sup> For example, in an examination of twenty-eight elite colleges and universities, researchers found the class ranking for black graduates with mean SAT I scores of 1300 and

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<sup>12</sup> L. Scott Miller, *Exploring High Academic Performance: The Case of Latinos in Higher Education*, 4 J. HISP. HIGHER EDUC. 252, 253 (2005).

<sup>13</sup> RICHARD P. DURAN, HISPANICS’ EDUCATION AND BACKGROUND: PREDICTORS OF COLLEGE ACHIEVEMENT 69–105 (1983); WARREN W. WILLINGHAM, SUCCESS IN COLLEGE: THE ROLE OF PERSONAL QUALITIES AND ACADEMIC ABILITY 180 (1985).

<sup>14</sup> WAYNE J. CAMARA & AMY ELIZABETH SCHMIDT, GROUP DIFFERENCES IN STANDARDIZED TESTING AND SOCIAL STRATIFICATION 6 (1999); LEONARD RAMIST ET AL., STUDENT GROUP DIFFERENCES IN PREDICTING COLLEGE GRADES: SEX, LANGUAGE, AND ETHNIC GROUPS 32–33 (1994).

<sup>15</sup> BRENT BRIDGEMAN ET AL., PREDICTIONS OF FRESHMAN GRADE-POINT AVERAGE FROM THE REVISED AND RECENTERED SAT I: REASONING TEST 6 (2000); JOHN W. YOUNG, DIFFERENTIAL VALIDITY, DIFFERENTIAL PREDICTION, AND COLLEGE ADMISSION TESTING: A COMPREHENSIVE REVIEW AND ANALYSIS 14 (2001).

<sup>16</sup> RAMIST ET AL., *supra* note 14, at 32–33.

<sup>17</sup> There is no particular evidence of the overprediction phenomenon at historically black colleges and universities, but if it did exist, it would be hard to identify in those largely (racially) homogenous environments.

above (the highest category) to be four percentiles lower than white graduates whose mean SAT I scores were less than 1000 (the lowest category).<sup>18</sup> Additionally, African American students in the study with SAT I scores over 1300 graduated at the 36th percentile, on average, while white students with similar scores graduated at the 60th percentile.<sup>19</sup> These researchers found a somewhat smaller, although significant, overprediction pattern for the Hispanics in their study relative to whites.<sup>20</sup> At many selective institutions, the percentage of European Americans and Asian Americans who graduate with a high GPA (3.5 on a 4 point scale) is three to five times the percentage of African Americans, Hispanics, and Native Americans who do so (these differences are even larger at very high GPA thresholds, i.e., 3.75 and over).<sup>21</sup> The more than half point difference in average GPAs between whites and blacks was about twice as large as predicted by differences in the academic preparation for college between these students.<sup>22</sup> This means that fewer than expected African American students will graduate with honors and an even larger number will graduate with low GPAs. One consequence of this reality is that elite institutions have not succeeded in eliminating the performance gap between Hispanic, black, and white students, even though they may recruit, enroll, and graduate many of the most able African American and Hispanic students at higher rates than other colleges and universities.

These large differences in academic performance are also evident at the graduate/professional school level. A new national study of the substantial academic achievement differences between African American and white law students shows that black students were heavily overrepresented among low GPA students in the first year of law school and acutely underrepresented among the top students.<sup>23</sup> This finding held for students enrolled in the nation's top law schools as well as for law schools overall. For example, about 52% of the black students who attended the nation's top ranked law schools had first-year GPAs that placed them in the bottom 10% of the class, while only 2% were in the top 10%.<sup>24</sup> The comparable percentages for whites

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<sup>18</sup> BOWEN & BOK, *supra* note 10, at 75.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 77–78 n.28, 283.

<sup>21</sup> L. SCOTT MILLER, WORKING MORE PRODUCTIVELY TO PRODUCE SIMILAR PATTERNS OF EDUCATIONAL PERFORMANCE AMONG RACIAL/ETHNIC GROUPS IN THE UNITED STATES 19 (2003).

<sup>22</sup> BOWEN & BOK, *supra* note 10, at 77.

<sup>23</sup> Sander, *supra* note 10, at 427.

<sup>24</sup> *Id.*

at the top law schools during the first year were 6% and 12%, respectively.<sup>25</sup> The very low overall academic achievement among the African American students in the sample persisted over all three years of law school. Among the black students in the sample who graduated from law school, about 42% had cumulative GPAs that placed them in the bottom 10% of all graduates, while only 2% had GPAs that placed them in the top 10%.<sup>26</sup> This slightly "better" GPA pattern for African American graduates relative to their first-year GPA pattern was not due to stronger performance in the last two years of law school, but rather a function of large numbers of very low performing students dropping out.<sup>27</sup>

### III. AFFIRMATIVE ACTION IN EDUCATION

As most of us are aware by now, black students have had a history of exclusion from well-resourced public grade schools and graduate and professional schools.<sup>28</sup> This situation began to change when some of the Jim Crow laws (promoted by the decisions of the Supreme Court) were struck down in a series of decisions<sup>29</sup> leading up to the *Brown v. Board of Education* decision.<sup>30</sup> These decisions, however, did not categorically end segregation, nor did they easily help to move Blacks from a position of imposed legal inferiority to one of equality. The cases did mark a shift in the Court's thinking. In the 1938 case *Missouri ex rel. Gaines v. Canada*, for example, the Supreme Court found that Missouri's barring of blacks from attending the state university's law school (and its issuing of tuition money instead to these students to enroll in out-of-state law schools) violated the Equal Protection Clause of the Fourteenth Amendment.<sup>31</sup> Twelve years later, the Court held that Texas violated the Fourteenth Amendment by establishing a separate law school for Blacks.<sup>32</sup> These cases led up to the

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 435.

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 2-5* (2001).

<sup>29</sup> *Morgan v. Virginia*, 328 U.S. 373, 373 (1946); *Sweatt v. Painter*, 339 U.S. 629, 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637, 637 (1950).

<sup>30</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954).

<sup>31</sup> *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 348 (1938).

<sup>32</sup> *Sweatt*, 339 U.S. at 636.

Supreme Court's 1954 decision in *Brown v. Board of Education*, which found school segregation in the South to be unconstitutional.<sup>33</sup>

The impact of *Brown*, however, was not as substantial as initially expected. There was an immediate systematic rejection of the desegregation decision by Southern politicians, local government officials, and enraged white citizens.<sup>34</sup> This blatant disregard for the Court's decision and the continued unconstitutional enforcement of segregation incited African Americans to organize.<sup>35</sup> The Montgomery, Alabama bus boycott in 1955–1956 is largely considered one of the catalysts of the civil rights movement. It gave Dr. Martin Luther King, Jr. a national platform with which to help galvanize efforts to desegregate schools, public transportation, and public places throughout the South. Despite these clarion calls for equality, the federal government did not take decisive action to protect the rights of black Americans. On one occasion, President Eisenhower did relent by sending federal troops to Little Rock when Arkansas Governor Orval Faubus openly defied court orders to integrate the schools. Congress's actions at this time were also considered ineffectual. It passed a Civil Rights Act in 1957<sup>36</sup> that was too weak to counteract the systemic obstacles to black voter registration in the South.

### *A. The Consideration of Race in Higher Education Admissions Policies*

By 1960, the Supreme Court rulings had not altered the educational landscape as expected. African American students comprised 4.8% of all enrolled college students in the United States in 1965; 7.0% by 1970; and 9.9% in 1980.<sup>37</sup> Black females made up 56.6% of all black students enrolled in 1980.<sup>38</sup> Among black twenty- and twenty-one-year-old males, a total of 64.7% had graduated from high school, while 74.4% of black females in these age groups had graduated from high school during this time.<sup>39</sup> If a

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<sup>33</sup> *Brown*, 347 U.S. at 495.

<sup>34</sup> BOWEN & BOK, *supra* note 10, at 3.

<sup>35</sup> STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 103–04 (Simon & Schuster 1997); RICHARD KLUGER, *SIMPLE JUSTICE* 749–50 (Alfred A. Knopf, Inc. 1975).

<sup>36</sup> Civil Rights Act of 1957, Pub. L. No. 89-670, 71 Stat. 634, 634–38 (1957).

<sup>37</sup> ANDREW HACKER, *U/S: A STATISTICAL PORTRAIT OF THE AMERICAN PEOPLE* 247 (1983).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 247–48.

black male finishes high school, he is more likely to attend college than a black female high school graduate.<sup>40</sup> Further, because the proportion of males who actually finish high school is less than that of females, more black females are represented in college than are black males. At this juncture in the 21st century, there is a growing consensus that the underrepresentation of black males in higher education has reached crisis proportions.<sup>41</sup>

The number of black students in selective colleges and universities was even more marginal than in higher education as a whole. Although a few institutions (Oberlin, Antioch College, Rutgers, and the University of California, Los Angeles) consciously took steps to recruit and enroll black students, "no selective college or university was making determined efforts to seek out and admit substantial numbers of African Americans" before 1960.<sup>42</sup> There were, however, pockets of interest in nurturing African American students for higher education. For example, the admissions director at Mount Holyoke College began recruitment efforts in 1959 in schools that had a pool of prospective black candidates and the college did in fact admit ten black students who then enrolled in 1964.<sup>43</sup> In 1963, Wellesley College started a junior-year program for African American students attending colleges supported by the United Negro College Fund.<sup>44</sup> Additionally, Dartmouth, Princeton, and Yale all introduced special summer enrichment programs to prepare promising students of color for possible admission to elite colleges.<sup>45</sup>

Despite these documented increases in recruitment efforts for black students in the mid-1960s, blacks made up only 1% of the total enrollment at selective New England colleges in 1965.<sup>46</sup> Some of the reasons for this marginal enrollment of black students on the part of selective colleges included demanding academic requirements, high standards for admission, and a level of tuition and fees that many black students could not afford. With respect to the nation's professional schools, scarcely 1% of all law students in America were black, with over one-third of them enrolled in all-

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<sup>40</sup> *Id.*

<sup>41</sup> THE RACIAL CRISIS IN AMERICAN HIGHER EDUCATION: CONTINUING CHALLENGES FOR THE TWENTY-FIRST CENTURY 23–40 (William A. Smith et al. eds., rev. ed. 2002).

<sup>42</sup> BOWEN & BOK, *supra* note 10, at 4.

<sup>43</sup> ELIZABETH A. DUFFY & IDANA GOLDBERG, CRAFTING A CLASS: COLLEGE ADMISSIONS & FINANCIAL AID, 1954–1994, at 138–39 (1998).

<sup>44</sup> *Id.* at 139.

<sup>45</sup> *Id.*

<sup>46</sup> S.A. Kendrick, *The Coming Segregation of Our Selective Colleges*, C. BOARD REV., Winter 1967–1968, at 6.



black schools.<sup>47</sup> African Americans accounted for close to 2% of all medical students, with three-fourths of them enrolled at Howard University and Meharry Medical College, two historically black universities.<sup>48</sup> This situation prompted Harvard Law School Dean Erwin Griswold to start a summer program in 1965 to interest juniors from historically black colleges in attending law school.<sup>49</sup> Harvard began admitting black students with test scores that were considerably lower than those of their white peers in 1966.<sup>50</sup> Black enrollment in other law schools began to rise as Griswold's model was replicated.<sup>51</sup>

The civil rights struggle took on a new intensity when black students in North Carolina initiated a series of sit-ins in 1960, in increasing rejection of segregation at Woolworth and other stores. A year later, "black and white freedom riders boarded buses bound for the deep South to protest continued segregation in buses and other forms of public transportation."<sup>52</sup> A federal judge ordered the University of Mississippi in 1962 to admit an African American student, James Meredith. "[V]iolence erupted as Governor Ross Barnett ordered state troopers to block Meredith's entry."<sup>53</sup> Governor George Wallace followed this precedent when he tried to keep two black students from attending the University of Alabama in 1963. In the midst of a nonviolent and determined uprising by black and some white Americans, President Johnson signed into law the Civil Rights Act of 1964<sup>54</sup> which obligated the federal government to make significant efforts to end state-enforced segregation. This act did not deter Alabama police from responding violently to a peaceful voting rights march in Selma in 1965. Congress reacted to the violent police action in Selma, Alabama by passing and enforcing a Voting Rights Act<sup>55</sup> that led to increased levels of black voter registration and election participation throughout the South.<sup>56</sup>

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<sup>47</sup> Robert M. O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U. TOL. L. REV. 281, 300 (1970).

<sup>48</sup> Herbert W. Nickens et al., *Project 3000 by 2000: Racial and Ethnic Diversity in U.S. Medical Schools*, 331 NEW ENG. J. MED. 472, 472 (1994).

<sup>49</sup> O'Neil, *supra* note 47, at 301.

<sup>50</sup> BOWEN & BOK, *supra* note 10, at 5.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 6.

<sup>53</sup> *Id.*

<sup>54</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241-68 (1964).

<sup>55</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 437-46 (1965).

<sup>56</sup> BOWEN & BOK, *supra* note 10, at 6.

President Johnson took another significant step when he advocated for a shift away from mere nondiscrimination stances to a more determined, affirmative effort to provide opportunities for black Americans. He asserted, in a 1965 speech at Howard University, that "[y]ou do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."<sup>57</sup> Johnson's conviction was reflected in the requirement by the Office of Federal Contract Compliance and the Equal Employment Opportunity Commission that federal contractors submit detailed plans, including goals and timeframes, for organizing a workforce that reflected the availability of African American workers in the appropriate labor market.<sup>58</sup> Shortly after, federal contractors had to include Hispanics, Asian Americans, and Native Americans in their recruitment efforts.

African American and other racial/ethnic workers of color were not the only population to assert their rights. Students began protesting on the campuses of colleges, universities, and professional schools across the country. These protests led to targeted interventions to recruit prospective minority applicants and the use of race in the admissions process. Many higher education institutions began to accept black students despite these students' overall lower test scores and grades when compared to the grades of their white peers.<sup>59</sup> These actions by admissions committees were perceived as being in the interest of not only nurturing a diverse student population with different backgrounds, perspectives, and talents, but also in developing a cadre of minority students for leadership roles.<sup>60</sup> The results included increased enrollment of black students in the Ivy League universities from 2.3% in 1967 to 6.3% in 1976 and an increase from 1.7% in 1967 to 4.8% in 1976 for these students' enrollment in other prestigious colleges and universities.<sup>61</sup> It is sobering but not surprising that, given the litigation against affirmative action and the *Bakke* decision<sup>62</sup> in particular,

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<sup>57</sup> Commencement Address at Howard University: "To Fulfill These Rights," 2 PUB. PAPERS 635, 636 (June 4, 1965).

<sup>58</sup> BOWEN & BOK, *supra* note 10, at 6.

<sup>59</sup> *Id.* at 6-7.

<sup>60</sup> *Id.* at 7.

<sup>61</sup> David Karen, *The Politics of Class, Race, and Gender: Access to Higher Education in the United States, 1960-1986*, 99 AM. J. EDUC. 208, 214 (1991).

<sup>62</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978).

black student enrollment dropped to 5.8% and 4.3% respectively in the Ivy League universities and other prestigious colleges and universities in 1986.<sup>63</sup>

Blackwell speculates that “[t]he pattern of access of black students to medical colleges during the 1970s can best be characterized by initial optimism and success, followed by declines [and] a leveling off.”<sup>64</sup> Blackwell’s analysis documents that of the 266 first-year black medical students enrolled in U.S. medical schools in the 1968–1969 academic year, roughly 60% were enrolled at Meharry and Howard Medical Colleges (historically black institutions) while fifty-four of the remaining ninety-seven medical institutions enrolled roughly two blacks each in their first-year classes.<sup>65</sup> In the early 1970s, “the 440 black medical school students, who represented 4.2% of all first-year classes combined, were still concentrated primarily at the two historically black medical colleges . . .”<sup>66</sup> The proportions of black students reached a peak of 7.5% in 1973 and 1974, and declined noticeably in subsequent years.<sup>67</sup> However, the phenomenon of black medical students who repeated their first year was a confounding factor because they are reported in figures that include enrolled black first-year medical students. In 1978–1979, black students had a repeat rate of 14.4% while students who were Mexican American, Puerto Rican, and Asian/Pacific Islander had repeat rates of 9.2%, 4.6%, and 2.7%, respectively.<sup>68</sup>

Blackwell hypothesizes that:

[I]nadequate undergraduate preparation in the basic sciences, weak self-discipline and poor study habits, insufficient time to study because of job commitments, family problems that interfere with conscientious studying, a hostile learning environment, prejudiced behavior by professors disinclined to be fair to minority students, and a whole range of adjustment problems experienced by black students in a substantially new, often overpowering and intimidating environment

may explain why black students in particular repeat their first year in medical school.<sup>69</sup>

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<sup>63</sup> Karen, *supra* note 61, at 214.

<sup>64</sup> JAMES E. BLACKWELL, *MAINSTREAMING OUTSIDERS: THE PRODUCTION OF BLACK PROFESSIONALS* 97 (2d ed. 1987).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 98. Bakke filed his suit in California in 1974. *Id.* at 97.

<sup>68</sup> *Id.* at 101.

<sup>69</sup> *Id.* at 100.

Despite these problems, the proportional increase in total enrollment for black students from 1969–1979 more than doubled.<sup>70</sup> This emergent trend was partially the result of rising levels of institutional commitment; increasing availability of financial aid to reduce these students' concerns about finances; and "aggressive recruitment, special admissions, and federal mandates to desegregate all components of post-secondary education . . . ."<sup>71</sup> Some of the more intrapersonal reasons included a shift in black students' views that pursuing medicine as a career was not only for the "economically affluent and socially influential" but was also a feasible career regardless of their socioeconomic backgrounds.<sup>72</sup>

The enrollment of black students in law schools during the 1970s included similar issues and successes. In the early 1970s, 1,115 black students were enrolled in J.D. programs in approved law schools, "represent[ing] 3.8% of all first-year enrollees."<sup>73</sup> The peak in the enrollment trend (5.9%) occurred later for black students in their first year of law school (in 1978–1979)<sup>74</sup> than for black students in their first year of medical school (1973–1974).<sup>75</sup> The total enrollment for all blacks in law school grew to 4.2% in 1979–1980.<sup>76</sup> Blackwell documented, however, that the representation of black law school students decreased at the end of the 1970s and attributed this phenomenon to a retreat by law schools in the wake of the *Bakke* decision (further resulting in a decline in black student enrollment and their attrition in the second and third years of law school). This decrease notwithstanding, many viewed blacks' and other minorities' presence in professional schools, medical and law schools included, as occurring at a great cost to white students. Blackwell's figure<sup>77</sup> of black students comprising 4.2% of total enrollment in 1979 is hardly "equivalent [to] or tantamount[] to equality of opportunity and equality of access in law schools."<sup>78</sup>

Blackwell's argument concerning this decline, however, was more balanced than it was unilateral. He acknowledged that although a larger proportion of able black students could be recruited for law school programs

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<sup>70</sup> BLACKWELL, *supra* note 64, at 102.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 288.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 290.

<sup>76</sup> BLACKWELL, *supra* note 64, at 290.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 289.

than is currently the case, "the fact remains that all too many black students are still victimized by weak preparation in elementary, secondary, and collegiate education. Too many suffer from deficiencies in oral communication and writing skills. There are problems of personal confidence, of sophistication, and of lack of ease in dealing with others."<sup>79</sup> On an institutional level, "the deliberate intimidation of students by prejudiced . . . professors" does little to foster black students' class participation.<sup>80</sup> Moreover, some professors'

attitudes . . . toward black and other minority students and faculty, . . . deliberate attempts to subject minority students to public embarrassment or ridicule, . . . harsher grading of minorities, . . . unwillingness to make the same kinds of exemptions or special dispensations for black students that they freely grant to white students, and . . . beliefs that all blacks [sic] students are necessarily less competent than even the average white student

all appear to contribute to black student attrition.<sup>81</sup>

In addition to these affective and attitudinal factors, Blackwell hypothesizes that the lack of financial capital was a barrier for many black students because relatively few black students were willing to go into debt in order to enroll in law school, especially when other career alternatives were available.<sup>82</sup> When black students do work while enrolled in law school, their grades may not only decline but their professors may also not consider the reasons behind this decline, resulting in further student attrition.<sup>83</sup> This phenomenon of student attrition is not peculiar to medical or law school nor to this period of time. Its prevalence twenty-five years later is documented and evident in the sciences, engineering, and mathematics.<sup>84</sup>

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<sup>79</sup> *Id.* at 294.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> BLACKWELL, *supra* note 64, at 294.

<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., Larry J. Shuman et al., Discussion at the Proceedings of the 32nd ASEE/IEEE Frontiers in Education Conference T4A-1-T4A-14 (Nov. 6-9, 2002); Dr. Freeman A. Hrabowski III, Supporting the Talented Tenth: The Role of Research Universities in Promoting High Achievement Among Minorities in Science and Engineering, Twenty-third David Dodds Henry Lecture at the University of Illinois at Urbana-Champaign (Nov. 5, 2003); Marguerite Bonous-Hammarth, *Pathways to Success: Affirming Opportunities for Science, Mathematics, and Engineering Majors*, 69 J. OF NEGRO EDUC. 92-111 (2000).

#### IV. THE BACKLASH AND CHALLENGES AGAINST AFFIRMATIVE ACTION

Although the use of race in admissions decisions during the 1960s was of concern to some higher education officials, particularly given the mandate of Title VI of the Civil Rights Act, which prohibited discrimination on the basis of race, color, and national origin in programs funded by the federal government, the requirement by federal officials in the early 1970s that colleges and universities submit affirmative action plans for minority students seemed to sanction admissions criteria that included race.<sup>85</sup>

Despite these gains and assumptions that black students could easily assimilate into their new environments, the integration of black students into higher education was indeed a complicated phenomenon.<sup>86</sup> Apparently, many black students were not only disappointed with their experiences in predominantly white institutions but also were caught in the sometimes-divisive discussions concerning "admissions criteria, support programs, residential arrangements, and curricular offerings."<sup>87</sup> This period also marked a leveling-off of enrolled black students as many selective colleges and universities dramatically reduced their admission of underprepared or high-risk black students while implementing other strategies for minority recruitment, including information dissemination, using faculty and student role models, arranging for students to visit colleges and universities, and providing financial assistance.<sup>88</sup>

In retrospect, the question was not whether the use of race in admissions decisions would be legally questioned, but when. That challenge came in *Bakke* in 1978.<sup>89</sup> This case defined the boundaries of affirmative action in education. Briefly, the University of California at Davis Medical School had reserved 16% of its existing seats for eligible minority students. Allan Bakke, a white student, claimed that he had been illegally disqualified from the medical school "to make room for minority applicants with inferior academic records."<sup>90</sup> In a five to four decision, the Supreme Court ruled that although a quota for minority applicants is illegal in the absence of a history of past discrimination, a student's minority status can be considered in the

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<sup>85</sup> Colleges and universities were required in 1967 to submit affirmative action plans for the hiring of minority and female faculty members.

<sup>86</sup> MARVIN W. PETERSON ET AL., *BLACK STUDENTS ON WHITE CAMPUSES: THE IMPACTS OF INCREASED BLACK ENROLLMENTS* 6 (1978).

<sup>87</sup> BOWEN & BOK, *supra* note 10, at 7.

<sup>88</sup> See BLACKWELL, *supra* note 64, at 102; DUFFY & GOLDBERG, *supra* note 43, at 145-48, 151-52.

<sup>89</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978).

<sup>90</sup> BOWEN & BOK, *supra* note 10, at 8.

admissions process.<sup>91</sup> Because the medical school, however, used racial quotas in admissions, the Court ruled that Bakke must be admitted.<sup>92</sup> In his separate opinion, Justice Lewis Powell argued that, although strict racial quotas are unconstitutional, considering race in admissions to achieve a diverse student body is a compelling institutional purpose.<sup>93</sup>

Given this mandate, many selective colleges, universities, and professional schools continued to take race into account in admitting minority students. Between 1975 and 1985, however, black student enrollment did not increase (nor did it decline). As indicated above, the percentage of black students enrolled in medical colleges peaked at 6.3% in the same year that *Bakke* was filed in California.<sup>94</sup> Other factors influencing this decline include the lack of adequate financial aid for black students, the growing reliance on standardized test scores and grade point averages, and "the presumed downgrading of subjective measures."<sup>95</sup> Bowen and Bok suggested that some of the macro explanations include the repercussions of the oil crisis and stagflation, which resulted in tuition increases and a reduction of recruitment efforts for minority students.<sup>96</sup> While many colleges and universities increased their recruitment efforts in the late 1980s as their economic situations improved, these efforts now included eligible Asian American, Hispanic, and Native American students and women.<sup>97</sup> In effect, black students were not only competing with their well-prepared white peers, but also with well-qualified Hispanic, Asian American and foreign students. Consequently, enrollment increased for Asian American and Hispanic students, while the enrollment of their African American peers plateaued.

The presidency of Ronald Reagan from 1981 to 1988 marked a period of significant opposition to affirmative action. This included Reagan's appointment of Supreme Court Justices who disagreed with the continuation of affirmative action. Reagan also restricted the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance from pursuing discrimination and affirmative action cases by reducing their budgets.<sup>98</sup> Despite Reagan's position, the National Association of

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<sup>91</sup> *Bakke*, 438 U.S. at 307–10.

<sup>92</sup> *Id.* at 315–20.

<sup>93</sup> *Id.* at 311–15.

<sup>94</sup> BLACKWELL, *supra* note 64, at 103.

<sup>95</sup> *Id.* at 102.

<sup>96</sup> BOWEN & BOK, *supra* note 10, at 8–9.

<sup>97</sup> DUFFY & GOLDBERG, *supra* note 43, at 152–58.

<sup>98</sup> TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 177 (2004).

Manufacturers approved a policy statement supporting affirmative action as good business policy.<sup>99</sup> Some companies voiced their opposition to the Reagan Administration's attempts to decrease the use of affirmative action.<sup>100</sup>

While the Supreme Court's decisions concerning affirmative action seemed to wax and wane in the 1980s,<sup>101</sup> a closer examination of these decisions suggests that they appear to reflect the particular contexts of their respective cases. The Court made clear in its 1989 decision in *City of Richmond v. J.A. Croson Co.* that a state or local institution can have a compelling interest in redressing the current impact of its own past discrimination.<sup>102</sup> At the same time, however, the Court also decided that redressing the enduring effects of societal prejudice and discrimination was too nebulous an objective to sanction a contracting program that considered race as a criterion.<sup>103</sup> "[Similarly, a plurality of the Court] ruled in *Wygant v. Jackson Board of Education*, that trying to remedy societal discrimination by providing role models for minority students was not a sufficiently compelling interest to justify a race-conscious [layoff policy]."<sup>104</sup>

In *Adarand Constructors, Inc. v. Peña*, the Supreme Court ruled for the first time that all government affirmative action programs—whether federal, state, or local—must meet the most exacting standard of analysis under the U.S. Constitution.<sup>105</sup> The "strict scrutiny" test means that any race-conscious program must "further compelling governmental interests" and be "narrowly tailored" to reach that end.<sup>106</sup> This narrow interpretation of affirmative action caused experts to speculate that fewer forms of affirmative action will be judged constitutional.<sup>107</sup> In a partial response to the ruling in *Adarand*, President Clinton gave a major speech in support of affirmative action on July 19, 1995. In this speech, the President called for reforms to "[m]end

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<sup>99</sup> Elizabeth Holmes Norton, *Equal Employment Law: Crisis in Interpretation—Survival Against the Odds*, 62 TUL. L. REV. 681, 685–86 n.17, 713 (1988).

<sup>100</sup> *Id.* at 713–14.

<sup>101</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 267 (1986).

<sup>102</sup> *Croson*, 488 U.S. at 491–92.

<sup>103</sup> *Id.* at 499.

<sup>104</sup> ANGELO N. ANCHETA, REVISITING BAKKE AND DIVERSITY-BASED ADMISSIONS: CONSTITUTIONAL LAW, SOCIAL SCIENCE RESEARCH, AND THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 9 (2003).

<sup>105</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>106</sup> *Id.*

<sup>107</sup> See, e.g., Ana Puga, *Court Hikes Standards for Antibias Programs: "Strict Scrutiny" Is Required on U.S. Affirmative Action*, BOSTON GLOBE, June 18, 1995, at 1.



[affirmative action], but don't end it."<sup>108</sup> He also initiated a review of federal programs that did not stir much interest.

In higher education, the Supreme Court's *Bakke* decision did not reconcile polarized views that (1) a racially, ethnically, and socially diverse student body is a compelling educational interest, and (2) "that the affirmative consideration of group identity violates both the academic norm and the principles for which this nation stands."<sup>109</sup> Rather, the latter perspective fueled opponents and generated significant victories against affirmative action. This polarization is reflected in the March 1996 decision of the United States Court of Appeals for the Fifth Circuit; it held in *Hopwood v. Texas* that not only was the *Bakke* decision nonbinding, but also that diversity was not a compelling educational interest.<sup>110</sup> The University of Texas Law School, in effect, could consider an applicant's race only if doing so was in the interest of redressing past discrimination by the school itself. *Hopwood* is striking in that a majority of the judges asserted that *Bakke* no longer characterized the Supreme Court's perspective and that the use of race to achieve a diverse student body was not a compelling enough state interest to satisfy the standard of strict scrutiny. It became illegal to take race into account in Texas public colleges and universities.<sup>111</sup> Texas compensated for this decision by stipulating that all students ranking in the top 10% in Texas high schools, public or private, are guaranteed entry to Texas colleges and universities. However,

[w]hen institutions say that they have ended affirmative action, they are almost always talking about one part of an interrelated process, while continuing affirmative policies on other fronts, either through direct action or by adopting "race-attentive" recruitment policies focused on largely minority communities and schools. . . .

In fact, simply enacting a percent plan does almost nothing to replace affirmative action. In Florida, for example, where race-conscious

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<sup>108</sup> Remarks on Affirmative Action at the National Archives and Records Administration, 2 PUB. PAPERS 1106, 1113 (July 19, 1995).

<sup>109</sup> MARK R. KILLENBECK, AFFIRMATIVE ACTION AND DIVERSITY: THE BEGINNING OF THE END? OR THE END OF THE BEGINNING? 3 (2004).

<sup>110</sup> *Hopwood v. Texas*, 78 F.3d 932, 944, 948 (5th Cir. 1996).

<sup>111</sup> Colleges and universities in Louisiana and Mississippi adhered to *Hopwood* because these states are in the Fifth Circuit.

affirmative action is outlawed only in admissions, it is actively pursued in other parts of the process.<sup>112</sup>

During this period, the Regents of the University of California declared that the nine universities in the state system were no longer allowed to consider race in admissions decisions. Shortly after this decision, Ward Connerly (a conservative black activist and University of California regent appointee of former California Governor Pete Wilson), headed an initiative in the 1996 elections in California to end affirmative action in contracting, employment, education, and hiring. After a heated debate, California voters ended state affirmative action programs when they passed Proposition 209.<sup>113</sup>

In the last few years of the 20th century, attempts by selective public institutions to enroll black, Hispanic, and Native American students have been met with lawsuits that challenged the constitutionality of using race in admissions policies. The most prominent cases include those filed against the University of Michigan's College of Literature, Science, and the Arts (*Gratz v. Bollinger*)<sup>114</sup> and the University of Michigan Law School (*Grutter v. Bollinger*),<sup>115</sup> whose appeals the Supreme Court heard in the spring of 2003. In *Grutter*, two central questions were considered in the majority opinion written by Justice O'Connor: (1) whether the use of race in higher education admissions decisions is a compelling interest; and (2) whether the consideration of race by the University of Michigan Law School was the only viable way for the school to achieve its goal of increasing diversity.<sup>116</sup>

The University of Michigan argued that its use of race in admissions decisions was necessary to create and sustain a diverse student body.<sup>117</sup> The university grounded its defense in social science findings that diversity not only potently impacts those in the educational enterprise but also the corporate, government, and defense sectors. The Supreme Court ruled on June 23, 2003 that the use of race in higher education admissions decisions in the interest of promoting diversity is constitutional.<sup>118</sup> Justice O'Connor's

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<sup>112</sup> CATHERINE L. HORN & STELLA M. FLORES, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES, at ix (2003).

<sup>113</sup> Bill Stall & Dan Morain, *Prop. 209 Wins, Bars Affirmative Action*, L.A. TIMES, Nov. 6, 1996, at A1.

<sup>114</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>115</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>116</sup> *Id.* at 327, 339.

<sup>117</sup> *Id.* at 328, 333.

<sup>118</sup> *Id.* at 328.

opinion stressed that the majority was accepting on “good faith”<sup>119</sup> and with “a degree of deference to a university’s academic decisions, within constitutionally prescribed limits” that “diversity will, in fact, yield educational benefits”<sup>120</sup> that “are both ‘real’ and ‘substantial.’”<sup>121</sup> Justice Powell’s opinion in *Bakke*, noting that achieving a diverse student body is a compelling governmental interest for higher education institutions, is clearly reflected and fully sanctioned in the *Grutter* majority opinion.

This ruling effectively clarified discrepant perspectives concerning the nurturing of student diversity as a compelling interest in the lower federal courts and permitted selective colleges and universities across the United States to continue to consider race in admissions decisions. The Court did not accept the plaintiffs’ argument (also endorsed by the United States government, the White House, the U.S. Department of Education, and others) that higher education admissions decisions must be race blind. The Court’s decisions also changed the nature of the 1996 ruling of the Fifth Circuit in *Hopwood v. Texas*<sup>122</sup> by permitting colleges and universities in Texas, Louisiana, and Mississippi to consider race in admissions decisions in efforts to increase student diversity.<sup>123</sup> Although state universities in California, Florida, Texas, and Washington are still prevented by state laws from using race in admissions decisions, private universities in these states can implement constitutionally approved race-conscious policies.

In the law school case, *Grutter v. Bollinger*, the Court essentially affirmed that admissions policies and programs in which race is one of several indicators that are considered in the context of individualized weighing of all prospective applicants can satisfy constitutional requirements.<sup>124</sup> In the *Gratz v. Bollinger* decision, however, the Court held that the university’s point system (which assigned a fixed number of points for underrepresented minority group members) was inflexible in that it did not provide sufficiently individualized consideration of applicants, nor was it narrowly tailored to promote student diversity.<sup>125</sup> The weakness in the university’s case was not the point system per se, but rather “the failure to provide meaningful individualized consideration that doomed the policy at issue in *Gratz*, an approach that stood in stark contrast to the one employed

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<sup>119</sup> *Id.* at 330.

<sup>120</sup> *Id.* at 328.

<sup>121</sup> *Grutter*, 539 U.S. at 330.

<sup>122</sup> *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

<sup>123</sup> *Grutter*, 539 U.S. at 328; *Gratz*, 539 U.S. at 268.

<sup>124</sup> *Grutter*, 539 U.S. at 334.

<sup>125</sup> *Gratz*, 539 U.S. at 270–72.

by the Law School.”<sup>126</sup> The wider implication of the Court’s decision in *Gratz* suggests that admissions policies that mechanically assign advantages predicated on race are constitutionally questionable.

Although the Court’s decisions specifically concerned university admissions policies, they are thought to have ramifications outside of higher education. An analysis by a group of leading constitutional law scholars suggests that the “rulings imply that student body diversity supplies a justification for race-conscious recruitment and outreach, as well as for financial aid and support programs.”<sup>127</sup> These scholars argue further that the Michigan “cases provide constitutional moorings for the defense of such programs when they are designed to advance diversity” although the “outcome of a legal test of such a program in the Supreme Court is uncertain.”<sup>128</sup>

## V. CONCLUSION

Killenbeck reminds us that although the debate about diversity and affirmative action, both before and after the Michigan cases, presumably applied only to African Americans, the guidelines at issue in these cases were not constrained to this racial group.<sup>129</sup> He pointed to the University of Michigan Law School’s inclusion of Hispanics and Native Americans in its argument for using the criterion of race to create racial and ethnic diversity on its campus.<sup>130</sup> Nevertheless, the debate surrounding affirmative action may be misguided, particularly because: (1) there is no momentum in the data for African American students regarding more high achievers;<sup>131</sup> (2) there are few empirically grounded strategies from preschool onward for getting more high achievers; (3) there is remarkably little empirical work underway at all levels, with the absence of attention to the African American middle class particularly notable; (4) there are few entities in a position to

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<sup>126</sup> KILLENBECK, *supra* note 109, at 17.

<sup>127</sup> THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 2 (2003).

<sup>128</sup> *Id.*

<sup>129</sup> KILLENBECK, *supra* note 109, at 6.

<sup>130</sup> *Id.*

<sup>131</sup> In a recent speech, William Bowen mentioned a study by the Andrew W. Mellon Foundation that is forecasting the growth and it evidently is not showing much. See William G. Bowen, President, The Andrew W. Mellon Foundation, Lecture III at the University of Virginia Thomas Jefferson Foundation Distinguished Lecture Series: Stand and Prosper! Race and American Higher Education 21 (April 31, 2004).

promote the necessary empirical work; (5) while there are a few effective interventions (i.e., the Meyerhoff Scholars Program at the University of Maryland, Baltimore County and the Biomedical Honor Corps at Xavier University), there is still a fundamental lack of leadership explicitly on high achievement from any quarter, but especially from African Americans and Latinos; and (6) the pool of top Asian students could easily double by 2020 or so and be much larger by 2030 (although immigration from east and south Asia might drop considerably over the period). That is, although competition for admissions to top universities might be much greater in a generation, African American students in particular (in addition to Mexican Americans and other Latino segments as well as Native Americans) may be less competitive than now, in relative terms, because most of the growth in top students will be among Asians.<sup>132</sup> At the very least, affirmative action has always been about buying time—time to grow the pool, which has meant learning how to do so. Unfortunately, we have not spent this time in learning and it would not be easy to change that quickly. Those of us who promote affirmative action spend our time rationalizing the use of alternative admission criteria rather than on the hard work of getting more high achievers. Meanwhile, few of the opponents of affirmative action care much about finding ways to increase the number of African American, Latino, and Native American high achievers. The author anticipates that the debate will get more serious over her professional lifetime. Indeed, by 2015 (just less than a decade from now), we will probably begin to hear talk about how it will have been fifty years since affirmative action and other efforts began. If there is not visible momentum regarding growing the pool of top students by then, that comment will have currency in many quarters.

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<sup>132</sup> E-mail from L. Scott Miller, Executive Director, National Task Force on Early Childhood Education for Hispanics, College of Education, Arizona State University, to Beatrice L. Bridglall, Research Scientist and Editor, The National Center for Children & Families, Teachers College, Columbia University (June 15, 2005).

